



MERIT SYSTEMS PROTECTION BOARD

Notice of Opportunity To File Amicus Briefs

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: The Merit Systems Protection Board (MSPB or Board) announces the opportunity to file amicus briefs in the matter of *Thomas F. Day v. Department of Homeland Security*, MSPB Docket Number SF-1221-12-0528-W-1, currently pending before the Board on interlocutory appeal. The administrative judge certified for interlocutory review the question of whether the provisions of the Whistleblower Protection Enhancement Act of 2012 (WPEA), 112 Pub. L. 199, may be applied retroactively to pending cases involving conduct occurring prior to its effective date.

Of particular relevance in *Day* is the question of the retroactive effect of section 101(b)(2)(B) of the WPEA, which provides in relevant part that a disclosure made to an alleged wrongdoer or during an employee's normal course of duties is not excluded from protection against reprisal under 5 U.S.C. § 2302(b)(8). In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001), the U.S. Court of Appeals for the Federal Circuit held that a disclosure made as part of an employee's normal duties, and through normal channels, was not protected under the Whistleblower Protection Act (WPA). The court in *Huffman* further held that a complaint made to a supervisor regarding the supervisor's own alleged wrongdoing was not protected under the WPA. *Id.* at

1350. The Board has applied the holdings in *Huffman* as binding precedent. See, e.g., *Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, ¶ 15 (2011). Therefore, the Board must determine in *Day* whether to apply the WPEA standard or the *Huffman* standard in determining whether disclosures that occurred prior to the effective date of the WPEA are entitled to protection. Information about the *Day* case and the WPEA may be found on the Board's website at www.mspb.gov/SignificantCases.

Interested individuals or organizations may submit amicus briefs or other comments on the question presented in *Day* no later than March 1, 2013. Amicus briefs must be filed with the Clerk of the Board. Briefs shall not exceed 30 pages in length. The text shall be double-spaced, except for quotations and footnotes, and the briefs shall be on 8 ½ by 11 inch paper with one inch margins on all four sides. All amicus briefs received will be posted on the Board's website at www.mspb.gov/SignificantCases after March 1, 2013.

DATE(S): All briefs submitted in response to this notice must be received by the Clerk of the Board on or before March 1, 2013.

ADDRESSES: All briefs shall be captioned "*Thomas F. Day v. Department of Homeland Security*" and entitled "Amicus Brief." Only one copy of the brief need be submitted. The Board encourages interested parties to submit amicus briefs as attachments to electronic mail addressed to mspb@mspb.gov. An email should contain a subject line indicating that the submission contains an amicus brief in the *Day* case. Any commonly-used word processing format or PDF format is acceptable; text formats are preferable to image formats. Briefs may

also be filed with William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419; Fax (202) 653-7130.

FOR FUTHER INFORMATION CONTACT: Molly Leckey, Office of the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419; (202) 653-7200; mspb@mspb.gov.

William D. Spencer

Clerk of the Board

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